80-1269

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

RAY JIMMY GIDDENS, *Petitioner,*

v.

STATE OF GEORGIA, *Respondent.*

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Does the open field doctrine previously announced in *Hester* v. *United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924) mean that a citizen may never have Fourth Amendment privacy rights in an open field, regardless of his attempts to take every step to insure himself of such privacy, in view of *Katz* v. *United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)?

2.

May a citizen obtain a reasonable expectation of privacy in an isolated farm field by surrounding same with a barbed wire fence and a locked gate?

3.

Do law enforcement officers violate the Fourth Amendment rights of an owner of real estate when without a warrant, or probable cause, and in the absence of exigent circumstances they climb a barbed wire fence immediately adjacent to a locked gate, when they have seen no contraband or illegal activity on the subject property, and enter a fenced and gated field for the purpose of conducting a random search?

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STATE OF GEORGIA, *Respondent.*

PETITION FOR CERTIORARI

REPORTED OPINION

This conviction was affirmed (5-4) by the Court of Appeals of Georgia on October 10, 1980, in case number 60223, *Giddens* v. *The State* (not yet reported).

GROUNDS OF JURISDICTION

The judgment sought to be reviewed is the judgment of the Court of Appeals of Georgia dated October 10, 1980.

Motion for rehearing was filed October 17, 1980, and was denied October 28, 1980.

Notice of intention to apply to the Supreme Court of Georgia for certiorari was filed on October 30, 1980, and petition for writ of certiorari to the Supreme

Court of Georgia was filed November 17, 1980. Petition for writ of certiorari to the Supreme Court of Georgia was denied by that court on November 26, 1980.

This court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under the provisions of 28 U.S.C. § 1257(3) in that the right of the petitioner which is claimed as the basis for review is petitioner's right to privacy and against unreasonable search and seizures guaranteed by the Fourth Amendment of the Constitution of the United States as applied to the State of Georgia by the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."
>
> Fourth Amendment, United States Constitution

STATEMENT OF FACTS

Approximately 10 days prior to September 8, 1979, while engaged in the surveillance of a residence in Valdosta, Georgia, a member of the Lowndes County, Georgia Drug Squad observed a pickup truck leave the residence. He followed it to a field in Berrien County, Georgia, which the driver entered through a locked gate and disappeared into the field. The agent did not identify the driver or the truck, nor did he observe any illegal activity or contraband in the field.

The agent left without entering the field and on the next day returned to the field with another officer.

The field was encircled by a fence consisting of four strands of barbed wire. It was bordered on three sides by a densely wooded area and was located in an isolated rural area of Berrien County. Facing the road was the barbed wire fence and a metal gate which was chained and padlocked. From the road the officers could observe no illegal activity nor any contraband.

The officers had obtained no further information concerning the field, the truck, or the truck driver other than what Owens had observed on the previous day.

The officers sought no warrant to search the field and did not attempt to ascertain the name of the owner of the field.

The officers climbed the fence, and without knowing whose property they were entering, and, to quote Officer Buckley, "just went looking".

Only after they had followed the path up to the middle of the field, which was on a rolling terrain, were they able to see marijuana growing in the field, which had not been visible from outside the fence.

The officers testified at the hearing on the Motion to Suppress that they based their entry into the locked enclosure solely on two facets: (1) A 10-month old report linking Jimmy Giddens name to undescribed drug activity, which report never materialized, and (2) the fact that Owens had followed an unidentified pickup truck from an unidentified surveillance point to this field. The entry and search were based on no other facts.

The officers also testified that it was obvious to them at the time of their entry into the locked premises that the owner had deliberately done everything within his power to insure his privacy. (Motion to Suppress transcript, page 25)

The officers followed a path to a metal shed opposite the gate and completely out of sight from the road or the gate. While searching inside the shed they discovered some tools and marijuana.

Based upon this entry and search the officers began a 10 day stake out of the field. The stake out led to the arrest 10 days later of Ray Jimmy Giddens on the dirt road near the field.

Defendant was indicted for possession of marijuana with intent to distribute. The trial court overruled his Motion to Suppress the evidence obtained by the original entry into the field, and Ray Jimmy Giddens was convicted and sentenced to the penitentiary.

FEDERAL QUESTION

Following his indictment for possession of marijuana with intent to distribute, and prior to arraignment, the defendant filed a written Motion to Suppress the evidence obtained as a result of the entry into his field and the subsequent investigation which proceeded directly from the original entry and search. Prior to trial the court held an evidentiary hearing on the Motion to Suppress, and received briefs from the parties in which the questions presented here were raised. The court denied the Motion to Suppress. This error was enumerated to the Court of Appeals of Georgia in brief on appeal and to the Supreme Court of Georgia by petition for writ of certiorari.

The Motion to Suppress and the order on the Motion are set forth in the appendix.

ARGUMENT

In *Hester* v. *United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924) this court held that the protection accorded by the Fourth Amendment is not extended to "open fields". Justice Holmes cited Blackstone for the common law origin of distinction between houses and open fields.

From 1924 until 1967, the *Hester* "open fields" doctrine was universally accepted and applied without qualification or analysis. The underlying rationale was the common law distinction between open fields and the house and its curtilage. Cases were therefore decided upon the basis of whether or not the property whose privacy had been invaded was or was not within the curtilage of the residence. This analysis invariably involved common law property concepts and rules.

In 1967 this court held that the Fourth Amendment protects people, not places. *Katz* v. *United States,* 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

In *Katz* the parties on appeal offered respective lists to the court of protected and non-protected places and asked the court to put Katz' telephone booth in one column or the other. The court refused to do so and pointed out that the Fourth Amendment protects what the citizen "seeks to preserve as private, even in an area accessible to the public . . ." *Katz,* 19 L. Ed. 2d 576, 582.

Since *Katz,* the criterion for determining application of the Fourth Amendment has been, not the pres-

ence or absence of an intrusion into any given enclosure, but rather whether or not in the area violated by the police the defendant had a reasonable expectation of privacy.

Likewise, in *U.S.* v. *Chadwick,* 433 U.S. 1, 53 L. Ed. 2d 538, 97 S. Ct. 2476 this court reaffirmed that reasonable expectation of privacy in an area, even a footlocker was sufficient to protect a citizen from unreasonable government intrusions.

The *per se* exclusion from Fourth Amendment protection, which has been interpreted by other courts to be the gist of the *Hester* decision is completely antagonistic to the analytical expectation of privacy test set forth in *Katz, Chadwick* and *Rakus* v. *Illinois,* 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421.

As a result of this apparent inconsistency, some state courts of last resort have determined this substantial federal constitutional question in conflict with other state courts and with federal courts of appeal.

In this case the Georgia Court of Appeals has decided an important question of federal law which should be settled by this court, and has decided the question in a way in conflict with applicable decisions in this court, particularly *Katz, Chadwick* and *Rakus.*

The Georgia Court of Appeals, like many other courts, has considered the field in this case to be an "open field" regardless of the barbed wire fence and locked gate, and by ignoring the efforts of this citizen to obtain privacy has in effect ruled that any area outside the curtilage is *per se* not entitled to Fourth Amendment protection.

This approach does two things: (a) It actually extends the *Hester* doctrine which did apply to an *unfenced* field, (and may well be said to rest upon principles of abandonment rather than the "open field" doctrine, for which it is so often cited) and (b) ignores the ruling of *Katz* that a person may make private a place otherwise considered public by taking steps to obtain a reasonable expectation of privacy in the area.

Katz requires the making of a value judgment. *Hester* arbitrarily declares land beyond the curtilage subject to scrutiny by the police at their whim no matter how careful the occupant has been to keep those lands private.

The Georgia Court of Appeals has applied the *Hester* doctrine in an arbitrary manner. Its only bow to *Katz* has been the injection of the "reasonable use of privacy" language into the *Hester* ruling. So that in this case the Georgia Court of Appeals, instead of simply stating that the Fourth Amendment does not apply to open fields under *Hester*, says that open fields are an area in which one cannot have a reasonable expectation of privacy. This injection of *Katz* language into an arbitrary application of *Hester* concepts causes confusion and results in deprivation of Fourth Amendment rights.

This confusion exists not only in Georgia but apparently throughout the country. Some federal courts such as the Ninth Circuit in *Wattenburg* v. *U.S.*, 388 F. 2d 853 (1968), and *U.S. ex rel. Getko* v. *Heer,* (D.C., W.D., Wis.) have held that the sole criteria to be applied in Fourth Amendment search and seizure questions is that of reasonable expectation of privacy,

and that *Katz* abolished a reliance upon common law property concepts including open field and curtilage in determination of Fourth Amendment rights.

Other state courts of last resort and federal courts of appeal in effect ignore *Katz* and continue to apply *Hester* to the effect that any area outside of a residence or its curtilage is *per se* excluded from Fourth Amendment protection. Such cases are *Conrad* v. *The State,* 63 Wis. 2d 616, 218 NW 2d 252 (1974); *Casey* v. *The State,* 87 Nev. 413, 488 P. 2d 546 (1971).

The writ of certiorari should be granted in this case to strike the balance between *Hester* on the one hand and *Katz* on the other. It is submitted that *Hester* was never intended to mean that all land outside of a residence or its curtilage was excluded from Fourth Amendment protection, and may even had been decided on an abandonment theory and "open field" doctrine, may be obitur dictum.

Whatever the rationale of *Hester*, it is obvious the *per se* denial of Fourth Amendment protection to certain areas, as that opinion has been construed to hold, has been radically changed by *Katz.*

This case presents a straightforward and uncontradicted factual situation and gives a good opportunity to resolve the conflict that has been created by state courts and courts of appeal attempting to resolve the apparent conflict between *Hester* and *Katz* in the application of the Fourth Amendment.

CONCLUSION

Petitioner respectfully submits that this petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing upon H. Lamar Cole, District Attorney, Southern Judicial Circuit, P. O. Box 99, Valdosta, Georgia 31601 and Arthur H. Bolton, Attorney General, State of Georgia, Judicial Building, Room 132, Atlanta, Georgia 30334 by placing same in a properly addressed envelope in an authorized depository of the United States Mail with sufficient postage thereon to insure delivery.

This 26 day of January, 1981.

/s/ J. CONVERSE BRIGHT
J. Converse Bright

APPENDIX

APPENDIX A

IN THE
COURT OF APPEALS OF GEORGIA

JULY

AFFIRMED

October 10, 1980

60223. GIDDENS v. THE STATE. McM-134

McMURRAY, Presiding Judge.

Law enforcement officers, conducting drug related investigations in Berrien County and Lowndes County, were conducting surveillances of certain residences. Defendant was placed under surveillance, after he visited one of these residences, and was trailed to a location in Berrien County where he disappeared into a field near the Georgia Sheriff's Boys Ranch. The officer, upon making inquiry at the ranch, learned the defendant's identity and after reporting back to his superiors, returned the next day with additional officers to the field.

The field was surrounded by a wire fence (four strands of barbed wire) and on the field was a storage building in which the officers found marijuana that was being processed. The building also contained hoses, fertilizer and cultivating equipment. The officers also found marijuana growing amidst the corn planted in the field. The officers withdrew and set up a surveillance on the building which was the only building on the field.

Several days later the officers felt that they had been spotted by the defendant while attempting to set up an additional surveillance so they arrested him at that time. Following the arrest the officers and defendant traveled

to the field where certain evidence, including substantial quantities of marijuana (plants ranging 6 to 15 feet in height), was confiscated.

The defendant's motion to suppress evidence confiscated from the field and the building thereon was denied. The defendant was indicted, convicted of the offense of possession of marijuana with intent to distribute and sentenced to 10 years' imprisonment, and payment of a fine of $5,000. The last 4 years of the sentence were to be served on probation upon payment of the fine and costs of $3,032.30, and other conditions. Defendant appeals. *Held*:

1. The defendant contends that both the visit to the field by the officers prior to his arrest and the visit subsequent to his arrest during which the evidence was actually seized were unreasonable searches and seizures. The defendant relies heavily upon the reasoning of Katz v. United States, 389 U.S. 347 (88 SC 507, 19 LE2d 576), arguing that he had a reasonable expectation of privacy in the cornfield. The state relies upon the so-called "open field" doctrine set forth in Hester v. United States, 265 U.S. 57, 59 (44 SC 445, 68 LE 898), and emphasizes that the uncontroverted evidence shows that the building located on the property contained no personal items or facilities for sleeping or any other facilities which would infer that the building was used as an office or dwelling.

There simply is no question involved in this case which brings into play the traditional rules applied to one's dwelling or surrounding curtilage. Various cases cited by the parties dealing with such issues are inapposite. Particularly, *Kelly v. State,* 146 Ga. App. 179 (245 SE2d 872) is inapposite as in that case the defendant's expectation of privacy arose from the fact that the area in question was within the curtilage of a dwelling (a tent).

Law enforcement officers did not see any of the growing marijuana or that which was being processed until

after they had crossed the wire fence surrounding the field. The wire fence of a type commonly used to restrict movement of livestock posed little obstacle to the entrance of law enforcement officers who were only later aware that the gate to the field was locked. The officers received no notice prior to their entry that the owner or rightful occupant forbade such entry. See Code Ann. § 26-1503 (b) (2) (Ga. L. 1968, pp. 1249, 1285; 1969, pp. 857, 859; 1979, p. 764).

Although Katz v. United States, supra, in setting forth the reasonable expectation of privacy test has altered the criteria for determining the applicability of the Fourth Amendment protection against unreasonable search and seizure when compared with some earlier cases, we do not believe that there has been any implied overruling of Hester v. United States, supra. Protected expectations of privacy under Katz v. United States, supra, must be reasonable. We do not believe that any expectation of privacy defendant had in regard to this field was reasonable under these circumstances.

We continue to adhere to our position that Hester v. United States, 265 U.S. 57, supra, remains a viable decision of the Supreme Court of the United States and binding on this court. See in this regard *Anderson v. State,* 133 Ga. App. 45, 46 (1) (209 SE2d 665); *Reece v. State,* 152 Ga. App. 760, 761 (1A) (264 SE2d 258); *Patterson v. State,* 133 Ga. App. 742, 745 (2) (212 SE2d 858). See also *Kennemore v. State,* 222 Ga. 252, 254 (2) (149 SE2d 471).

2. During the state's closing argument to the jury the district attorney stated: "I don't believe any farmers were left on this jury . . . They were all stricken . . ." Defendant moved for mistrial on the basis of this argument contending that it injected facts which were not in evidence. However, a prosecutor is entitled to argue to the jury his version of what took place at the trial. *Bryant v. State,* 146 Ga. App. 43, 44 (2) (245 SE2d 333).

An additional motion for mistrial was made in regard to another portion of the state's closing argument to the jury. The language in question, however, did no more than call to the attention of the jury that the state has an interest in proper law enforcement (in this case, stopping the drug traffic). This argument was proper. *Demps v. State,* 140 Ga. App. 90, 91 (2) (230 SE2d 97).

3. Defendant contends that the trial court ignored the sentence hearing procedure required by Code Ann. § 27-2503 (Ga. L. 1974, pp. 352, 357), determined the sentence prior to the sentence hearing, and drafted the sentence prior to the hearing, simply filing this pre-prepared sentence after the pre-sentence hearing. Pretermitting the issue of whether such conduct is harmful error, the factual allegations upon which these contentions are based appear only in defendant's brief and are not supported by the record submitted to this court by the clerk of the trial court. This court may not decide cases upon the basis of factual allegations appearing only in the parties' brief and unsupported by the record from the trial court. *Young v. State,* 144 Ga. App. 712 (1) (242 SE2d 351). The burden of showing harmful error rests on the appellant. *Raymond v. State,* 146 Ga. App. 452, 453 (2) (246 SE2d 461).

4. The sentence of 10 years provided that the defendant be permitted to serve the last 4 years on probation conditioned on defendant's having paid the $5,000 fine assessed against him within 90 days of the date of final judgment on remittitur of any appeal and contingent upon the defendant's complying with a number of other conditions, including payment of court costs in the amount of $3,032.30, composed of the following expenses: $1,080 juror cost, $132 witness fees, $150 court reporter, $108 bailiff fees, $1,484.30 sheriff's cost for guarding field, harvesting and preserving the evidence, and $78 transcript of evidence. Defendant was to begin paying the above at the rate of

$200 per month beginning 3 months after defendant's release from prison, same to be paid through the probation department and remitted directly to the county treasury when collected. The remaining error enumerated is to the assessment of the $3,032.30 court cost as a condition of probation. Clearly, not all of the costs above could be taxed against the defendant as court costs.

Generally, a defendant in a criminal case can be taxed with costs. "If convicted, judgment may be entered up against him for all costs accruing in the committing . . . [or] . . . trial courts, and by any officer pending the prosecution." See Code Ann. § 27-2801 (Constitution of 1976, Art. I, Sec. I, Par. XXI; Code Ann. § 2-121). Costs generally include all charges fixed by statute as compensation for services rendered by officers of the court in the progress of the cause. See *Markham v. Ross,* 73 Ga. 105 (1 (b)). Authority for fee costs for special criminal bailiffs is found in Code § 24-3202. The sheriff and court reporter are also officers of the court.

The defendant contends that the assessment of costs here is not authorized by statute and is thus illegal. Defendant argues further that the cost could not be intended to be part of the fine because the sentence also includes the maximum fine allowed under the provisions of Code § 79A-811 (j) (3) (Ga. L. 1979, p. 1258). In *Peters v. State,* 9 Ga. 109, it was held that railway mileage fare could not be included in the bill of costs against the defendant charged with burglary. Indeed, in *Stamper v. State,* 11 Ga. 643 (2), it was held that "all officers charging costs, . . . must always show the *authority of the law* to do so." It is contended here that the expenses of the sheriff in guarding the marijuana field and harvesting and preserving it would not fall within the definition of costs which can be charged to the defendant. See Code § 24-2823 (as amended, Ga. L. 1943, p. 591; 1945, p. 144; 1945, p. 221; 1955, pp. 383, 384; 1968, pp. 988, 991; 1976, pp. 702, 705; 1979, pp. 988, 992) as to costs in criminal cases.

But the above expenses have not been taxed against this defendant as costs. Merely probation has been conditioned upon the payment of same in accordance with the conditions of probation. Code Ann. § 27-2711 (Ga. L. 1956, pp. 27, 32; 1958, pp. 15, 23; 1965, pp. 413, 416) provides for certain terms and conditions of probation. However, this statute states that the court shall determine the terms and conditions of probation and "may provide" certain conditions of probation set forth therein. It does not state that other conditions of probation may not be placed upon the probationer in order to allow him to serve the sentence outside the confines of the penitentiary. In *Collett v. State,* 131 Ga. App. 411 (206 SE2d 70), banishment of the defendant from seven counties in a metropolitan area as a condition of suspension of the sentence was held by this court to violate public policy. However, in *State v. Collett,* 232 Ga. 668 (208 SE2d 472), the judgment of the Court of Appeals was reversed, the Supreme Court stating at page 671 as follows: "When this [banishment from the 7 counties] is considered against the background of the power and authority a trial judge has under the law to suspend a sentence under such rules and regulations as he deems proper, we cannot agree that the present sentence 'is illegal and void,' as contended by the defendant." The Supreme Court was there of the opinion that the banishment from the 7 counties for a period of 12 months was not necessarily shown to be unreasonable or otherwise fails to bear a logical relationship to the rehabilitative scheme of the sentence pronounced for a drug crime.

Here we have the defendant attacking the probated portion of his sentence which is certainly in his favor in allowing him to serve 4 years of his 10 year sentence outside the confines of the penitentiary. We have found no authority which would prevent the court from determining the terms and conditions of his probation which is within the sound discretion of the court in probating it. The court could very well have imposed a ten year sentence upon the de-

fendant without any portion of it being probated. We find no abuse of discretion by the court in requiring the above payments as a condition of probation.

Judgment affirmed. Deen, C.J., Shulman, Birdsong and Sognier, JJ., concur. Quillian, P.J., Smith, Banke and Carley, JJ., dissent.

SMITH, Judge, dissenting.

The majority concludes that, since the area in question lies within a field, the Fourth Amendment is simply inapplicable. I respectfully dissent.

According to the majority, Fourth Amendment protection extends to a home or a curtilage, but not to a field. Notwithstanding some authority to the contrary, I do not believe the Fourth Amendment questions raised by this case can be resolved by resort to a mere labelling process. "[T]his effort to decide whether or not a given 'area' is 'constitutionally protected' deflects from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210; United States v. Lee, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. United States, 364 U.S. 253, Ex parte Jackson, 96 U.S. 727, 733." Katz v. United States, 389 U.S. 347, 351-352 (88 SC 507, 192 LE2d 576) (1967). "[W]herever an individual may harbor a reasonable 'expectation of privacy' . . . he is entitled to be free from unreasonable governmental intrusion." Terry v. Ohio, 392 U.S. 1, 9 (88 SC 1868, 20 LE2d 889) (1967); *Kelley v. State*, 146 Ga. App. 179 (245 SE2d 872) (1978). "[A]n appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion." People v. Edwards, 80 Cal. Rptr. 633, 635 (App. 1969). "The test of reasonableness is dependent upon the totality of facts and circumstances involved in the context of each case. . ." Phelan v. Superior Court, 151 Cal. Rptr. 599, 603 (App. 1979).

The majority bases its decision on Hester v. United States, 265 U.S. 57 (44 SC 445, 68 LE 898) (1924). The federal cases are in conflict as to the meaning of Hester. See United States v. Freie, 545 F2d 1217 (9th Cir. 1976); Wattenberg v. United States, 380 F2d 853 (9th Cir. 1968); Atwell v. United States, 414 F2d 136 (5th Cir. 1969); United States ex rel Saiken v. Bensinger, 546 F2d 1292 (7th Cir. 1976). See also People v. Lashmett, 71 Ill. App. 3d 429 (389 NE2d 888) (1979). Nonetheless, there appears to be a tendency to apply the "open fields" doctrine in cases where the evidence shows the area in question to be readily accessible and open to the public (see Air Pollution Variance Board v. Western Alfalfa Corp., 416 US 861 (94 SC 2114, 40 LE2d 607) (1974); McDowell v. United States, 383 F2d 599 (8th Cir. 1967)), or where the indicia of private ownership fail to demonstrate a reasonable expectation of privacy (see United States v. Hare, 589 F2d 242 (5th Cir. 1979); People v. Bradley, 81 Cal. Rptr. 457 (1969); State v. Charvat, 573 P2d 660 (Mont. 1978)). The Georgia cases cited by the majority appear to be supportive of this conclusion. See also *Frazier v. State*, 138 Ga. App. 640, 645-646 (227 SE2d 284) (1976). In my view, a determination based upon reasonable privacy expectations is clearly preferable to a determination based upon a characterization of the place of search because it more closely reflects the core value expressed by the Fourth Amendment—freedom from unreasonable governmental intrusion. See Berger v. New York, 388 US 41, 53 (87 SC 1873, 18 LE2d 1040) (1967).

The area in question in the instant case is located in a sparsely populated rural county. The property is surrounded by a barbed wire fence. A photograph of the entrance to the property shows that a "no trespassing sign was posted, although the testimony is in conflict as to whether the sign was posted at the time of the search. The entrance to the property was blocked by a large metal gate. At the time of the search, the gate was locked. The area where the marijuana was located was surrounded by hills

and dense foliage. The area could not be seen from adjoining property. Under these circumstances, I must conclude that appellant had an "actual subjective expectation of privacy" and that the expectation was "objectively reasonable." United States v. Freie, supra at 1223. See State v. Wert, 550 SW2d 1 (Tenn. Crim. App. 1977); State v. Larkin, 588 SW2d 544 (Tenn. 1979); Phelan v. Superior Court, supra. In terms of the "open field" doctrine, the area in question was not "open."

For the reasons stated above, I believe the investigatory search undertaken by the police in this case was subject to the Fourth Amendment. The state has shown no exigent circumstances relieving the police of their duty to obtain a search warrant. Indeed, the state has not demonstrated that the police ever had probable cause to search. I cannot subscribe to the view that, merely because the tool shed and surrounding property cannot be characterized as a house and curtilage, the police had unlimited authority to conduct a general exploratory search of both. Appellant clearly had a legitimate expectation of privacy with respect to the area in question. Without probable cause and a warrant, the area was not subject to police intrusion. Under the circumstances of this case, the motion to suppress should have been granted.

BANKE, Judge, dissenting in part.

I concur in the majority opinion with the exception that I do not agree that a "house" must be a "dwelling house" to come within Fourth Amendment protection. The Amendment merely states "houses," and there is no constitutional requirement that non-dwelling houses be within the curtilage to acquire protection. I would suppress the evidence found in the house.

It is well settled that persons cannot expect privacy in an "open field," nor is an "open field" covered by the Fourth Amendment in these circumstances. I would overrule the motion as to evidence from the "open field."

CARLEY, Judge, dissenting in part.

I think that the key to the proper decision in this case is a determination of whether or not as to a particular area or enclosure the defendant had a reasonable expectation of privacy. As Judge Smith states in his dissent, "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347 (88 SC 507, 192 LE2d 576) (1967). Nevertheless, I agree with the majority's application of controlling precedent to hold that in this case the defendant had no such reasonable expectation of privacy as to the "open field." However, I agree with Judge Banke's separate dissent to the effect that the storage building was a structure in which the defendant had the necessary expectation of privacy so that the protection of the Fourth Amendment applied. Thus, while I concur in the majority's affirmance of the trial court's denial of the motion to suppress as to the evidence found in the "open field," I would reverse as to the denial of the motion with respect to the material found in the storage shed. See *Hardwick v. State*, 149 Ga. App. 291 (254 SE2d 384) (1979), and *Buday v. State*, 150 Ga. App. 686 (258 SE2d 318) (1979).

I am authorized to state that Presiding Judge Quillian joins in this dissent.

APPENDIX B

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, OCTOBER 1980

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

60223 RAY GIDDENS v. THE STATE

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

October 28, 1980

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, Clerk.

APPENDIX C

CLERK'S OFFICE

SUPREME COURT OF GEORGIA

ATLANTA, November 26, 1980

Dear Sir:

Case No. 37016, Giddens v. The State.

The Supreme Court today denied the writ of certiorari in this case. All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

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APPENDIX D

IN THE SUPERIOR COURT FOR THE COUNTY OF BERRIEN, STATE OF GEORGIA

CASE NUMBER 79-551

STATE OF GEORGIA

VS.

RAY JIMMY GIDDENS
Defendant

OFFENSE: Possession of Marijuana with intent to distribute

February Term, 1980

VERDICT OF GUILTY

SENTENCE OF COURT

WHEREUPON, it is ordered and adjudged by the Court that the Defendant, Ray Jimmy Giddens, be taken from the Bar of the Court to the jail of this County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Commissioner of the Department of Offender Rehabilitation may direct, where he, the said defendant, shall be confined at labor for a term of ten (10) years to be computed according to law, and also pay a fine in the sum of $5,000.00.

IT IS FURTHER ORDERED BY THE COURT that said sentence be served in confinement; provided, that the defendant be permitted to serve the last four (4) years of said sentence on probation conditioned on defendant having paid the fine hereinabove imposed within ninety (90) days from this date of a final judgment on remittitur of any appeal, with said probation to begin immediately upon defendant's release from confinement—contingent upon the defendant comply-

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ing with the following other conditions herein imposed by the Court as a part of this sentence:

1. Do not violate the criminal laws of any governmental unit.
2. Avoid persons and places of disreputable or harmful character.
3. Report to the Probation-Parole Supervisor as directed and permit such supervisor to visit him at home or elsewhere.
4. Work faithfully at suitable employment insofar as may be possible.
5. Do not change his present place of abode, move outside the jurisdiction of the Court or leave the State for any period of time without prior permission of the Probation-Parole Supervisor.
6. Support his legal dependents to the best of his ability.
7. Do not associate with anyone on probation or parole.
8. Do not consume or possess any alcoholic beverages, malt beverages, illegal narcotics, illegal drugs or marijuana.
9. Do not go to or hang around any billiard parlor or pool room.
10. Do not go to any place where alcoholic beverages, malt beverages, illegal narcotics, illegal drugs or marijuana are sold or dispensed.
11. If permitted to move or travel to another state, agree to waive extradition from any jurisdiction where he may be found and not contest any effort by any jurisdiction to return him to the State of Georgia.
12. Not to have in his possession any kind of firearms.

13. Defendant is directed to attend all alcohol and drug training and counseling as directed by Probation-Parole Supervisor.

14. That defendant shall pay the court costs in the amount of $3,032.30 (Said amount composed of the following expenses: (1) Juror costs $1080.00; (2) Witness fees $132.00; (3) Court Reporter $150.00; (4) Bailiff fees $108.00; (5) Sheriff costs for guarding field and harvesting and preserving the evidence $1484.30; and (6) Transcript of evidence $78.00) as follows: at the rate of $200.00 per month beginning three (3) months after defendant's release from prison. Said costs to be paid through the Probation Department and remitted directly to the County Treasury of Berrien County, Georgia, when collected.

15. Defendant shall report to the Adel Probation Office within 48 hours after release from prison.

This 7th day of March, 1980.

/s/ W. D. KNIGHT
Judge of Superior Courts
Alapaha Judicial Circuit

Defendant

Supervisor

APPENDIX E

IN THE SUPERIOR COURT FOR THE
COUNTY OF BERRIEN
STATE OF GEORGIA

Criminal Case No. 79-551

STATE OF GEORGIA,

VS.

RAY JIMMY GIDDENS,
Defendant

POSSESSION OF MARIJUANA

ORDER

The Defendant, RAY JIMMY GIDDENS, having filed a Motion to Suppress Physical Evidence obtained as a result of a search of a field located in Berrien County, Georgia, owned by Ray Jimmy Giddens, and the matter coming on regularly to be heard, evidence was submitted, and after argument of counsel, and after counsel for the Defendant and State had submitted written briefs to the undersigned,

IT IS THE JUDGMENT of the Court that the same be, and the same is hereby overruled and denied. The uncontroverted evidence heard by the Court at the Motion to Suppress showed that the Defendant's land consisted of an "open field" containing no dwellings or curtilage within the protection of the Fourth Amendment, and it being shown to the Court that the "open field" is an area outside of the scope of the protection of the Fourth Amendment of the Constitution of the United States of America. *Hester v. United States,* 265 U.S. 56 (1923).

WHEREFORE, said search of the Defendant's field is a reasonable search and is not in violation of the Fourth Amendment of the Constitution of the United States of

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America, Defendant's Motion to Suppress is and it is hereby the ORDER of this Court that said motion is overruled and denied.

This 18th day of February, 1980.

/s/ H. W. LOTT
H. W. Lott, Judge, Superior Courts
Alapaha Judicial Circuit

APPENDIX F

IN THE SUPERIOR COURT OF BERRIEN COUNTY
STATE OF GEORGIA

Trial Docket Number: 79A-811J

THE STATE

vs.

RAY JIMMY GIDDENS

MOTION TO SUPPRESS

I.

(a) Ray Jimmy Giddens moves the court for an order to suppress as evidence against him in the trial upon the above indictment, or in any other case which he is defendant, any evidence, property or contraband found on land lot 509 of the 10th land district of Berrien County, Georgia, being approximately 70 acres and the property of Ray Jimmy Giddens.

(b) Ray Jimmy Giddens further moves to suppress as evidence upon the trial in the above indictment or any other case which he is a defendant any information obtained as a result of the initial, unlawful entry on to defendant's said property, including all information obtained by surveillance by law enforcement officers resulting from the initial unlawful entry on said property, evidence of all overheard conversations which were part of the surveillance of said property, and all evidence obtained by said officers while conducting said surveillance.

The grounds of this motion are as follows:

1.

On some date approximately 10 days prior to September 8, 1979, the exact date being unknown to the defendant,

Agents Gene Buckley and Steve Owens, climbed a locked gate entering defendant's property described above and made a search of defendant's property. As a result of said search, these and other officers conducted a surveillance of defendant's property for approximately 10 day to two week period.

2.

The above search was warrantless.

3.

The above described search was without the consent of the defendant or any person in control of the property.

4.

The above search was unreasonable.

5.

The above search was without probable cause.

6.

The officers at the time of conducting the aforesaid search and seizure were acting unlawfully and as trespassers.

II.

Ray Jimmy Giddens, defendant, moves the court for an order suppressing as evidence on the trial of the above indictment, or any other case in which he is a defendant, the following:

One marijuana plant approximately 6½ feet; seed (marijuana); several bags of marijuana from barn; five bags with machine; one plastic trash bag; approximately 2 ounces of marijuana; one paper bag with approximately 6 ounces; one box of glad bags (30 gallon bags); one box

with plastic bottle with seeds; one plastic bottle with seeds in shoe box; 24 yellow pills; one plastic bag with marijuana seeds; one set of seeds; all evidence, property and contraband seized by Gene Buckley and Steve Owens or any other law enforcement officers on September 8, 1979, from the residence of Ray Jimmy Giddens and from the property of Ray Jimmy Giddens.

The grounds of the motion are:

1.

The search and seizure was purportedly made by authority of a warrant issued September 8, 1979, by E. Hulyn Smith, Judge of Small Claims Court Lowndes County. The affidavit upon which the warrant is based is facially deficient, and does not constitute probable cause for the issuance of a search warrant, in that the facts stated do not provide sufficient logical grounds for the conclusion reached, to wit: that there was marijuana on the person of Ray J. Giddens and on the premises known as Route 2, Box 157, Hahira, Lowndes County, Georgia.

2.

The description of the place to be searched and the persons or things to be seized is not sufficiently particular and is broader in scope than that described in the affidavit upon which the warrant is based.

3.

The affidavit contains misrepresentations of material facts, the truth of which facts are essential to the validity of the warrant.

4.

The affidavit upon which the warrant is based is facially defective in that it fails to show probable cause for accepting the reliability of the information included therein and

fails to show recency and currency of the facts included therein.

5.

The search and seizure conducted by the aforesaid officers, resulting in the seizure of the property described above, went beyond the scope of the warrant," and went beyond places described in the warrant, and was therefore warrantless, unreasonable and unlawful.

6.

The information contained in the warrant was obtained by Tom Williams and other law enforcement officers illegally and by unreasonable and unlawful searches and seizures.

The above searches and seizures violate the provisions of the Fourth and Fourteenth Amendments of the United States Constitution and of Article I, Section I, Paragraph X of the Constitution of the State of Georgia.

BLITCH & SUTTON
/s/ By: BERRIEN L. SUTTON
Berrien L. Sutton

I hereby certify that I have served counsel for the opposing party in the above-stated case with a copy of the foregoing by mailing same to him in a properly stamped and addressed envelope by U.S. Mail.

This 28 day of November, 1979.

/s/ BERRIEN L. SUTTON

NO. 80-1269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY JIMMY GIDDENS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether the Court of Appeals of Georgia properly determined that there was no reasonable expectation of privacy concerning the field and shed.

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NO. 80-1269

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RAY JIMMY GIDDENS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Ray Jimmy Giddens, was indicted during the February Term, 1979, in the Superior Court of Berrien County, Georgia. Prior to

trial, a motion to suppress was filed and a hearing was conducted on that motion. After considering the evidence, the trial court overruled the motion to suppress. At the conclusion of the trial, the Petitioner was convicted of the offense of possession of marijuana with intent to distribute and was sentenced to ten years imprisonment with the last four years of that sentence to be served on probation. Petitioner also received a $5,000.00 fine and was ordered to pay court costs as a condition of his probation.

The evidence admitted at the hearing on the motion to suppress and at trial indicated that law enforcement officers were conducting investigations into drug related activities in Berrien County and Lowndes County, Georgia, which are adjoining. After Petitioner was seen visiting a residence which the authorities

had under surveillance, he was followed to a field which was later discovered to be in Berrien County. The officer following the Petitioner inquired at the Georgia Sheriff's Boys Ranch, which is located next to the field and learned the Petitioner's identity.

The next day, additional officers returned to the field based on the officer's report. The testimony indicated that the field was surrounded by a barbed-wire fence. Photographs indicated that the fence contained four strands of wire. Testimony also indicated that there was a gate on the fence, but the testimony was conflicting as to whether the gate was locked at the time the officers entered. The officers testified they did not enter by way of the gate, but either crawled through the fence, or climbed over it. Although photographs introduced by the defendant show a no trespassing sign on a

tree near the gate, testimony by the officers indicated that they did not see this sign at the time they entered the field. Further testimony indicated that there was evidence to show that the sign may have been placed on the tree after the officers entered the field.

At trial, Petitioner introduced several witnesses who testified that Petitioner had invited them out to this same field. Three witnesses actually accepted the invitation and went to the field with one witness going five times. Each of these witnesses testified that the gate to the field had not been locked.

Although a building was located on the field, the uncontroverted evidence presented at trial shows that there were no personal items or facilities for sleeping in this building. Officers also testified that there were no personal papers or belongings in the building, but merely a shed containing tools and marijuana.

Officers testified that they began an observation of the field based on this discovery. Petitioner was arrested after the officers believed that he had discovered their presence and their observation of the field.

On direct appeal to the Court of Appeals of Georgia, Petitioner raised, among other allegations, the question of the legality of the search of the field and the shed. The Court of Appeals of Georgia affirmed the conviction finding that there was no reasonable expectation of privacy under the circumstances in this case. Giddens v. State, __ Ga. App. __, Case No. 60223 (October 10, 1980). Petitioner filed a motion for rehearing in the Court of Appeals of Georgia which was denied on October 28, 1980. Petitioner then filed an application for certiorari in the Supreme Court of Georgia to review the judgment of the Court of Appeals. This application was

denied on November 26, 1980. Petitioner has now filed the instant petition with this Court again seeking review of the issues decided in the state courts.

Further facts will be developed as necessary for a more thorough consideration of the issues raised by the present petition.

PART TWO

REASON FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS OF GEORGIA PROPERLY FOUND THAT THERE WAS NO REASONABLE EXPECTATION OF PRIVACY IN REGARD TO ITEMS FOUND IN THE FIELD IN THE INSTANT CASE.

Petitioner has placed great emphasis on the holding of this Court in Katz v. United States, 389 U.S. 347 (1967), and its effect on the so called open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1924). Petitioner attempts to have this Court grant certiorari to resolve alleged confusion in the continuing viability of the open fields doctrine after Katz. Respondent asserts that there is no existing confusion as to the application of this doctrine, nor

did the decision in Katz preclude the use of the open fields doctrine.

In this Court's opinion in Hester v. United States, supra, the Court noted that "the special protection accorded by the Fourth Amendment to the people in their persons, houses, papers and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Hester, supra at 59. Subsequently, in this Court's decision in Katz v. United States, this Court emphasized that the Fourth Amendment protects people and not places. Under Katz, there are two requirements that must be met, that is, that a defendant have exhibited an actual subjective expectation of privacy and that the expectation be one that society is prepared to recognize as reasonable. Katz, supra at 362.

In upholding the continued use of the open fields doctrine, the Fifth Circuit Court of Appeals noted that "although the expectations test has done away with outmoded property concepts no longer satisfactory for fourth amendment analysis [cites omitted] the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations." United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978). The Court went on to note that it still would hold that open fields surrounding a house would not be protected under the Fourth Amendment.

Petitioner cites a case from the Ninth Circuit Court of Appeals in an attempt to show confusion on the part of the various circuits. The case cited by the Petitioner, Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968), was cited in a later decision by that same

Court in which the open fields doctrine was utilized. The Court in Wattenburg was specifically considering an area immediately adjacent to a residence. The Ninth Circuit later held that information gained as a result of a trespass on an open field area is not unconstitutional. United States v. Capps, 435 F.2d 637, 640 (9th Cir. 1970).[1]

Clearly, courts have continued to recognize the viability of the open fields doctrine and have applied it using the rationale set forth by this Court in Katz. The courts have used the idea of an open

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1/ Both the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals have continued to recognize the viability of the open fields doctrine. See United States v. Basile, 569 F.2d 1053 (9th Cir. 1978), cert. den. 436 U.S. 920; Ehlers v. Bogue, 626 F.2d 1314 (5th Cir. 1980).

field to determine what actually constitutes reasonableness, that is, what society is prepared to recognize as reasonable.

Respondent submits that under the facts of the instant case, even though the Petitioner may have manifested a subjective expectation of privacy in the marijuana plants discovered on the field and in the shed, that expectation was not one that fits the requirements of reasonableness as set forth in Katz. The Court of Appeals of Georgia noted that "The wire fence of a type commonly used to restrict movement of livestock posed little obstacle to the entrance of law enforcement officers who were only later aware that the gate to the field was locked. The officers received no notice prior to their entry that the owner or rightful occupant forbade such entry." Giddens v. State, supra. Although

there was a barbed-wire fence surrounding the field, clearly in a rural county, this is more often intended as an impediment to lifestock rather than people. Furthermore, a barbed-wire fence does not present any barrier to observing any activity on the field. The officers testimony that there was not a "no trespassing" sign at the time of their entry further establishes the fact that there was no reasonable expectation of privacy in this area.

In United States v. Williams, supra, the Fifth Circuit Court of Appeals addressed the question of law enforcement officers crossing a fence. That Court had noted that it had not considered the crossing of a fence significant unless the area included the house of the individual. Although at the time of the search in Williams, the fence had become

somewhat broken down, the fact situations are still analogous. The Fifth Circuit Court of Appeals noted that "The fence in question here was not a privacy fence or an exclusionary one; in its best days, it was meant to do no more than keep the hogs in, not to keep anyone out. . . . We think that the fence was not such as to create either any reasonable expectation of added privacy or to join the still shed to or separate it from the residences." United States v. Williams at 454. Similarly, the fence in the instant case did not appear to be one designed to keep people out. It did not offer any impediment to vision and offered only minimal impediment to ingress. Thus, Respondent asserts that any expectation of privacy Petitioner may have had to this area was completely unreasonable considering the particular facts of this case.

There is also some question as to the actual subjective expectation of privacy on the part of the Petitioner. As noted previously, numerous individuals were invited to visit the field and did visit the field on various occasions. These witnesses all testified that the gate had not been locked when they visited the area. Furthermore, the law enforcement officials testified that the marijuana plants were growing several feet higher than the dead or dying corn plants around them. Based on this information, the expectation of privacy on the part of the Petitioner is highly questionable.

Respondent asserts that based on the facts in this case, there was no reasonable expectation of privacy on the part of the Petitioner to the field involved. If the Hester doctrine is applied, it is clear that this is an open field and that there is no

Fourth Amendment protection extended to this area. Even were this Court to determine that the Hester doctrine does not extend a per se exclusion of areas from Fourth Amendment protection, it is clear that under the facts of the instant case, the requirements set forth in Katz v. United States, have not been met. Thus, there was no Fourth Amendment violation on the part of any law enforcement officers. This Court should decline to grant certiorari as there has been no federal constitutional violation presented for review.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Ray Jimmy Giddens.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

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District Attorney

CERTIFICATE OF SERVICE

I, John C. Walden, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States Mail with proper address and adequate postage to:

Mr. J. Converse Bright
Blackburn, Bright, Edwards
& Dodd
1008 North Patterson Street
Valdosta, Georgia 31601

This 23rd day of February, 1981.

/s/
JOHN C. WALDEN